1	WINDTBERG & ZDANCEWICZ, PLC							
2	Post Office Box 51826 Phoenix, AZ 85076-1826							
3	Phone: (480) 584-5660							
4	Fax: (480) 584-5958 courtdocs@wzfirm.com							
	Michael Zdancewicz - 12426							
5	Marc Windtberg - 24802							
6 7	Attorneys for Capital One Auto Finance, a division of Capital One N.A.							
8	UNITED STATES BANKRUPTCY COURT							
9	DISTRICT OF ARIZONA							
10	In re:	No. 4:16-bk-09718-SHG						
11	Hilaria Burcham,	Chapter 13 Proceeding						
12	Debtor.	MOTION FOR RELIEF FROM THE						
13		AUTOMATIC STAY						
14	Capital One Auto Finance, a division of Capital	And MOTION FOR RELIEF FROM THE						
15	One N.A., CODEBTOR STAY							
16	Movant,	Property Description: 2011 Chevrolet Malibu VIN						
17	V.	1G1ZC5E14BF123337						
	Hilaria Burcham, (hereafter the "Collateral")							
18	Respondent.							
19								
20	Capital One Auto Finance, a division of Capital One N.A. (hereafter the "Movant" or							
21	"Secured Creditor") is a secured creditor possessing a lien upon property more particularly							
22	described below. Movant contends it is entitled relief from the automatic stay and the Codebtor							
23	Stay because the contract secured by the Collateral is in default. Relief is requested under 11							
24	U.S.C. §362(d)(1) and 1301. Movant requests the court to find:							
25	a. That cause exists to terminate the automatic stay;							
26	b. That cause exists to terminate the codebtor stay;							
11		<u>'</u>						

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c.	Waiving the fourteen (14) day provision of Bankruptcy Rule 4001(a)(3) that would
stay the	e effectiveness of any Order is appropriate;

- d. That any Order lifting the stay will be binding in the event this matter is converted to another proceeding under the Bankruptcy Code; and,
- e. That Movant may file an amended proof of claim for any deficiency balance within thirty (30) days of disposition of the Collateral, or by the claims bar date, whichever is later.

The following Memorandum of Points and Authorities support this Motion.

MEMORANDUM OF POINTS AND AUTHORITIES

- 1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 157(b)(2)(G) and 11 U.S.C. § 362.
- Hilaria Burcham shall be referred to as the Debtor. Hilaria Burcham and Bryan
 W. Burcham executed and delivered to Secured Creditor a contract (hereafter the "Contract").
- 3. Repayment of all amounts due on the Contract is secured with the following described collateral:

2011 Chevrolet Malibu VIN 1G1ZC5E14BF123337

(hereafter referred to as the "Collateral")

- 4. Exhibit 1 is a true and correct copy of the Contract and it is incorporated herein by reference.
- 5. The Secured Creditor's lien on the Collateral is properly perfected. See Exhibit 2: Records from the Arizona Department of Transportation, Motor Vehicle Division reflecting Secured Creditor's lien.
- 6. Movant is the owner and holder of the Contract and the documents securing repayment of all amounts due.
 - 7. Payments have not been made pursuant to the terms of the Contract.
 - 8. The failure to make timely payments prejudices Secured Creditor.

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- 9. Payments are due under the Contract.
- 10. Debtor surrendered possession of the Collateral to Creditor.
- 11. Debtor's plan provides for the surrender of the Collateral (ECF 42 paragraph number 6).
 - 12. There is little or no equity in the Collateral.
 - 13. The amount of the debt as of the date of the filing of this Motion is \$30,045.87.
- 14. The National Automobile Dealers Association ("NADA") places the retail value of the Collateral at \$8,050.00. See Exhibit 3: Valuation Evidence.
- 15. Movant is entitled to relief from the Automatic Stay for cause, because payments are not being received in accordance with the Contract.
- 16. Movant further request the Court waive the provisions of Bankruptcy Rule 4001(a)(3), which would stay the order for relief until the expiration of 14 days after the entry of the order.

LEGAL ANALYSIS

Pursuant to Bankruptcy Code § 362(d)(1) and 1301, relief from the automatic stay shall be granted "for cause," including, without limitation, lack of adequate protection. *See*, 11 U.S.C. §362(d)(1).

In addition, a party with an interest in property is entitled to relief from the automatic stay if: (i) the debtor lacks equity in the property, *and* (ii) the property is not necessary for an effective reorganization that is in prospect. *See*, 11 U.S.C. § 362(d)(2); *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assoc.*, *Ltd.*, 484 U.S. 365, 108 S. Ct. 626, 98 L.Ed.2d 740 (1988).

Movant seeks relief from the Codebtor Stay to allow Movant to exercise its rights in the Collateral.

A. Sufficient "Cause" Exists to Grant Relief from The Automatic Stay.

Pursuant to 11 U.S.C. § 362(d)(1), a party-in-interest may be granted relief from the automatic stay for cause. The term "cause" is not defined in the Bankruptcy Code and must be

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determined on a case by case basis. *MacDonald v. MacDonald (In re MacDonald)*, 755 F.2d 715, 717 (9th Cir. 1985) (citations omitted); *see also In re Delaney-Morin*, 304 B.R. 365, 369 (9th Cir. B.A.P. 2003).

B. Termination of the Stay is Appropriate Under 11 U.S.C. § 362(d)(2) Because There is No Equity in the Collateral and There is No Need for the Collateral as part of the Reorganization.

As alternative grounds for relief from the automatic stay, Movant alleges that there is no equity in the Collateral, and the Collateral is not necessary for an effective reorganization. Pursuant to 11 U.S.C. § 362(d)(2), a party in interest may be granted relief from the automatic stay if: (i) the debtor does not have equity in the property; and (ii) the property is not necessary for an effective reorganization. Once the Movant establishes that there is no equity in the Property, "it is the burden of the debtor to establish that the collateral at issue is 'necessary to an effective reorganization." *Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. at 375-376. "What this requires is not merely a showing that if it is conceivable to be an effective reorganization, this property will be needed for it; but that the property is essential for an effective reorganization that is in prospect." *Id.* (emphasis original).

REQUEST FOR RELIEF

For the reasons set forth above, Movant respectfully requests the following:

- A. That cause exists to terminate the automatic stay;
- B. That cause exists to terminate the codebtor stay;
- C. Waiving the fourteen (14) day provision of Bankruptcy Rule 4001(a)(3) that would stay the effectiveness of any Order is appropriate;
- D. That any Order lifting the stay be binding in the event this matter is converted to another proceeding under the Bankruptcy Code; and
- E. That Movant may file an amended proof of claim for any deficiency balance within thirty (30) days of disposition of the Collateral, or by the claims bar date, whichever is later.

Dated: <u>August 22, 2017.</u>

1 WINDTBERG & ZDANCEWICZ, PLC 2 /s/ Michael Zdancewicz (#012426) Michael Zdancewicz 3 Marc Windtberg Post Office Box 51826 4 Phoenix, AZ 85076-1826 5 Attorneys for Capital One Auto Finance, a division of Capital One N.A. 6 Certificate of Service I certify that on August 22, 2017, a true and correct copy of the above and foregoing was served 7 upon the following parties by regular first-class mail: 8 Dianne C. Kerns Wayne Mortensen 9 7320 N. La Cholla #154 PMB 413 Mortensen Law Offices, PLLC Tucson, AZ 85741-2305 1901 E. University Dr., Ste. 360 10 Mesa, AZ 85203 11 Bryan W. Burcham Hilaria Burcham 1910 S Avenue A, #13B 6502 E. 42nd St. 12 Yuma, AZ 85364 Tucson, AZ 85730 13 /s/ Michael Zdancewicz 14 15 16 17 18 19 20 21 22 23 24 25 26

EXHIBIT 1

Stock #		lealer Number	Contract Number	Conditor-Saller /No	(drace)				
Buyer Name and Ad (Including County ar HILARIA BUR 6502 E 42ND TUCSON, AZ	nd Zip Code) CHAM ST 85730	(Includin BRYA 6502 TUCS	r Name and Address g County and Zip Code) N W BURCHAM E 42ND ST DN, AZ 85730	ORIELLY CHEVROLE 6160 E BROADHAY TUCSON, AZ 85732 Phone: 520-747-80	T INC.				
You, the Buyer (and C on the front and back funds according to the	of this contract. You a e payment schedule b	agree to pay the Credit elow. We will figure you	cash or on credit. By signing this contract, yo or - Seller (sometimes "we" or "us" in this co rr finance charge on a daily basis. The Truth	choose to him the vehicle on cre	dit under the anreements				
New/Used/Demo	Year and	Make I Model Odome ROLET 12	Vehicle Identification Num	personal,	For Which Purchased family or household				
		BU		☐ business ☐ agricuttura					
ANNUAL PERCENTAGE RATE The cost of your credit as a yearly rate.	FINANCE CHARGE The dollar amount the credit will cost you.	TH-IN-LENDING I Amount Financed The amount of credit provided to you or on your behalf.	ISCLOSURES Total of Payments The amount you will have paid after you have made all payments as scheduled. \$48389.76 Total Sale Price Frice The total cost of your purchase on every discharge of the price of the pr	Insurance. You may buy the anost this contract requires you choose who is accept required to buy any other insu. If any insurance is certificates from the name i describe the terms and condit Check the insurance you Optional Credit Life: Buyer Credit Life: Buyer	rance to obtain credit. oked below, policies or insurance companies will ions. want and sign below: t insurance Co-Buyer Both				
Your Payment So Number of Payments	Amount of Payments	Credit Disability (Buyer Only) Premium: Credit Life \$ _NA							
72 Or As Follows:	N.A.	Credit Disability \$ _N.A Insurance Company Name N.A							
Late Charge. If payment is not received in full within 10 days after it is due, you will pay a late charge of 5% of the part of the proprient has been part of the proprient that is take. The propayment. If you pay of all jour other aim, you will not have to pay a paralty. Security interest. You are giving a security interest in the whole being purchased. Additional information: See this contact for more information including information about nonpayment, ordeaut, any required repayment in full before the scheduled date and security interest. ITERIZATION OF ABOUNT FINANCED 1. Cash Price A Ceah Price of Motor Vehicle (notiding accessories, services) \$ 3,0849_0.00 and required of payments of the payments									
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(Identify) G Government Cer H Other Charges (Seller must identify who is	X Co-Buyer Signature Returned Check Charge: You agree to pay a charge of \$25.00, plus actual charges assessed by a financial institution, if any check you give us is dishonored.							
describe purpos to to	for for	OPTIONAL GAP CONTRACT. A gap contract (debt cancellation contract) is not required to obtain credit and will not be provided unless you sign below and agree to pay the extra chame. If you							
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OPTION: You pa	y no finance charg	r SELLER'S INT							
The Seller hereby warrants that this vehicle will be fit for the ordinary purposes for which the vehicle is used for 15 days or 500 miles after delivery, whichever is earlier, except with regard to particular defects disclosed on the first page of this agreement. You (the purchaser) will have to pay up to \$25.00 for each of the first two repairs if the warranty is violated. ATTENTION PURCHASER: SIGN HERE ONLY IF THE DEALER TOLD YOU THAT THIS VEHICLE HAS THE FOLLOWING PROBLEMS, NADTHAT YOU AGREET OB UTVITE VEHICLE ON THOSE TERMS: ATENCION COMPRADOR: FIRME AQUI SOLAMENTE SI EL VENDEDOR TE HA DICHO QUE EL VEHICULO TIENE EL SIGUIENTE PROBLEMA(S) Y QUE USTED ESTA DE ACIERTO DE COMPRA EL VEHICULO BAJO ESTOS TERMINOS: 1, M.A. 2.N.A. 3.N.A.									
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Buyer Signs (Date) Co-Buyer Signs (Date) WARRANTIES Unless the Seller makes a written warranty, or enters into a service contract within 90 days from the date of this contract, the Seller makes no warranties on the vehicle, except as described above for used vehicles. Making no warranties emans that the Seller is selling the vehicle as is — not expressly warranted or guaranteed and without any Implied warranties of merchantability (except as described above) or of fitness for a particular purpose. This provision does not affect any warranties covering the vehicle that the vehicle manufacture may provide.									
☐ IF THE B	OX IS CHECK	ED, THIS CONT	RACT IS SUBJECT TO A BR	KER FEE PAID BY T	HE SELLER TO				
or for legal cause	e. You cannot cance	ling off" or cancellati I this contract simpl	O COOLING OFF PERIOD on period for this sale. After you sign this pecause you change your mind. This n	tice does not apply to home	solicitation sales.				
exemptions gr. THE VEHICLE, HOW THIS CONTRA and we must sign it. If any part of this con may extend the time	anted upon the w YOU WAIVE ALL ACT CAN BE CHANGE No oral changes are bin tract is not valid, all oth for making some paym	ehicle, which is the RIGHTS PROVIDED. This contract contains ding. Buyer Signs are parts stay valid. We rents without extending	urity interest in the vehicle and here is subject of this contract. NOTICE DBY LAW TO CLAIM SUCH PROP the entire agreement between you and us relain to the contract of the co	E BY GIVING US A SECUL ERTY EXEMPT FROM PR to this contract. Any change to this Buyer Signs tts under this contract without losin	CONTROL TO SERVING THE SERVING				
NOTICE TO THE BUYER: (1) Do not sign this contract before you read it or if it contains any blank spaces. (2) You are entitled to an exact copy of the contract you sign. The Annual Percentage Rate may be negotiable with the Seller. The Seller may assign this contract, and retain its right to receive a part of the Finance Charge.									
YOU ACKNOWLEDGE THAT YOU HAVE READ BOTH SIDES OF THIS CONTRACT, INCLUDING THE ARBITRATION CLAUSE ON THE REVERSE SIDE, BEFORE SIGNING BELOW. THE REVERSE SIDE, BEFORE SIGNING BELOW. THE ARBITRATION YOU confirm that before you signed this CONTRACT DOES NOT INCLUDE Institutions regulates the Seller and can contract, we gave it to you, and you were LIABILITY COVERAGE FOR BODILY fere to take it and review it. You confirm INJURY AND PROPERTY DAMAGE Suite 310, Phoenix, Actional \$5018, (602) and you received a completely filled-in CAUSED TO OTHERS.									
Buyer Signs	Buyer Sight To 01/22/2011 OBJET SIGHE VROLET INC. 01/22/2011								

SEE BACK FOR OTHER IMPORTANT TERMS AND AGREEMENTS.

CoBuyers and Other Courses signs here X

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Other proper signs here X

- FINANCE CHARGE AND PAYMENTS

 a. How we will figure Finance Charge. We will figure the Finance Charge on a daily basis at the Annual Percentage Rate on the unpaid part of the Annual Finance with a day counted as 1765kin.

 b. How we will spip payments we may apply each payment to the earned and unpaid part of the Finance Charge, to the unpaid part of the Annual Financed and to other annuaris you owe under this contract in any order we chosen.

 c. How late payments or early payments change what you must pay. We based the Finance Charge, Total of Payments, and Total Sale Price shown on the front on the assumption that you will make every payment on the day it a due. How Finance Charge, Total of Payments, and Total Sale Price shown on the front on the assumption that you will make every payment on the day it due. How Finance Charge, Total of Payments, and Total Sale Price shown on the front on the assumption that you will make every payment on the day it due. How Finance Charge, Total of Finance Charge, Total of Finance Charge, Total of the Annual Final payment.

 We will send you an otice letting you about these changes before the final scheduled payment is due.

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 If the vehicle is damaged, destroyed, or missing. The signes to pay us all you own under this contract reen if the vehicle. It is not to the contract reen if the Liding the vehicle. You agree not to remove the vehicle for mis contract without our witten permission. You agree not to expose the vehicle to missue, solution, conflication, or minoriumlary intradist. If we pay any rapia bills, loadeg bills, laxes, lines, or charges on the vehicle, you agree to rappy the amount

- not to expose the vehicle to nisuse, solure, conflication, or involunitary transit. If we pay any repair bils, storage bils, taxes, lines, or charges on the vehicle, you agree to repay the amount when we ask for expose the vehicle, you agree to repay the amount when we ask for a security interest in You gho us a security interest in You gho us a security interest or goods put on it.

 All money or goods received (proceeds) for the vehicle;
 All insurance, maintenance, service, or other contracts we finance for you; and
 All proceeds from insurance, maintenance, service, or other contracts we finance for you. This includes any refunds of premiums or charges from the contracts.

 This secures payment of all you over on this overlides are the little above or charges from the contracts.

 This secures payment of all you over on this overlides are the little above or exactly interest [line] in the vehicle.

 Insurance you must have on the vehicle.

 Insurance you must have on the vehicle. If you do not have this insurance, we may, if we choose, buy physical damage insurance. If we occide to buy physical damage insurance, we may, if we choose, buy physical damage insurance, we may life to you for the payment of the cost of the insurance and a finance or buy insurance had covered to the insurance and a finance for insurance, we will sely own which you owner to the cost of the insurance and a finance for insurance, we will sely own which you own.

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- the refund from what you owe.

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 If you pay late, we may also take the steps described below.
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 You give us false, incomplete, or misleading information on a codel application;
 You start a proceeding in bankruptcy or one is started against you or your property.

 You break any agreements in this content.

 You break any agreements in this content.

 You break any agreements in this content.

 Financed plus the earned and unpaid part of the Amount Finance object to be the payment of the and receiving induce to elevation in obtained. However, the contract, it is your responsibility to keep the listed address current. Unlawful failure to return a motor vehicle subject to a security interest is a class 6 telony. Assuming there are no aggravating circumstances, and you have no prior felony convictions, the maximum penalty is 1 year in prison and a \$150,000 feet.

- We may take the whicks from you. If you default, we may take the whicks from you if we do so possed billy and the law alone. If your vehicle has an electronic tracking device when you find you will not you will not not you find you will not you all your expense. If you do not ask for these teams back, we may dispose of them as the law allows.

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Applicable Law
 Federal law and the law of the state of the Seller's address shown on the
front of this contract apply to this contract.

7. SELLER'S RIGHTS IN ABSENCE OF CREDIT APPROVAL:

SELLER'S RIGHTS IN ABSENCE OF CREDIT APPROVAL:

(a) You agree to furnish us any documentation necessary to verty information contained in the credit application, (b) You advonvedge that it may take a few days for us to verify your credit and assign this contract. In consideration of our agreeing to deliver the verbice, you agree that if we are untable to assign the contract to any one of the financial was assignated to assign the contract to any one of the financial was expected to the second of the contract to assign the contract of the contract to expect the vertical properties to us, we may cancel this contract, (c) in the event we cancel this contract, we shall give you notice of the contract, (c) in the event we cancel this contract, on the vertical to the contract of the vertical to the vertical t

NOTICE: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

The preceding NOTICE applies only if the "personal, family or household" box in the "Primary Use for Which Purchased" section of this o chocked. In all other cases. Buyer will not assert against any subsequent holder or assignee of this contract any claims or delenses t (debtor) may have against the Selfer, or against the mandacturer of the vehicle or equipment obtained under this contract.

The undersigned, jointly and severally, guarantee payment of all amounts owing under this contract and the payment upon demand of the entire amount owing on the notice in the event of default in payment by Boyer named therein. The undersigned webes notice of performance, demands for performance, notice of non-performance destances in contracts, notice of adversaries, notice of adversaries on the Guaranty, of any elevations in the origination, of seal of any in the localisation and of all other notices exists, notice of adversaries, notice of adversaries, notice of adversaries, and of all other notices when the undersigned webs to otherwise entitled by law and agrees to pay all amounts owing the contrader upon demand, without requiring any action or proceeding against variety and applications are undersigned webs any eight or perfect and applications of the processing and adversaries and any other information relating to the undersigned green understances and any other information relating to the undersigned green on the Solite, prior to signify pelvaries of assert Motors to Colleges for familiar and the payment of the undersigned of the undersigned of the processing of the undersigned of the undersigned green on the Solite, prior to signify pelvaries all asserts Motors to Colleges (see 1).

- ABBITRATION CLAUSE

 PLEASE REVIEW IMPORTANT AFFECTS YOUR LEGAL RIGHTS

 INTERPRETATION OF WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN US DECIDED BY ARBITRATION AND NOT IN COURT OR BY JUPY TRIAL.

 FOR DISPUTE IS ARBITRATED YOU WILL LIVE UP YOUR RIGHT TO PARTICIPATE AS A CLASS REPRESENTATIVE OR CLASS FOR DISPUTE ANY CLASS CLAIM YOU HAVY HAVE AGAINST US INCLUDING ATM AY RIGHT TO CLASS ARBITRATION OF ANY CONSCILIDATION OF INDIVIDUAL ARBITRATION ARE GENERALLY MODELLIMITED THAN IN A LAWSUIT, AND OTHER RIGHTS THAT YOU AND WE WOULD HAVE IN COURT HAVE TO THE ARBITRATION.

THAT YOU AND WE WOULD HAVE IN COURT MAY NOT BE AVAILABLE IN ARBITRATION.

Any claim or dispute, whether in contract, lord, statute or otherwise (including the interpretation and scope of this Arbitration Clause, and the arbitratility of the claim or dispute), between you and us or our employees, agents, successors or assigns, which arises out of or relates to your cored application, purchase or condition of this vehicle, this contract or any resulting transaction or relationship (including any relationship with brind parties who do not sign this contract) shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action. If electral law provides that a claim or dispute is any object to binding arbitration (hause shall not apply to such action. Any claim or dispute is to be arbitrated by a single arbitration or an inclivitual basis and not as a class action. You expressly waive any right you you're. NY 1001-14650 (few.wad.cor.go), or any other organization that you choose subject to una approval. You may get a copy of the rules of these organizations by contacting the arbitration or qualitation or visiting its website.

organizations by contacting the arbitration organization or visiting its website.

Arbitrators shall be diverged or retired judges and shall be selected pursuant to the applicable rules. The arbitrator shall only opportunity or the properties of the properties of

Form No. 553-AZ-ARB (7/10)

EXHIBIT 2



48-7200 R08/15 azdot.gov -

Vehicle Identification Number !G1ZC5E14BF123337

First Registered

022825

บ2/2011 "

CAPITAL ONE AUTO FINANCE PO BOX 660068 SACRAMENTO CA 95866-0068

Mobile Home Manufacturer

Model

Body Style

Title Number

004N011067088

Previous Title Number

MCO

Issue Date

00000000

03082011

Issue Date

Film Number L067004N44

Previous Film Number

ORIGINAL

Odometer Reading (no tenths)

0000012

A - Actual Mileage B - Mileage in exces C - NOT Actual Miles

Arizona Brands

State Previous Brand

State Previous Brand

State Other States With Brands

Owners/Lessees

HILARIA BURCHAM 6502 E 42ND ST

BRIAN WAYNE BURCHAM

TUCSON

AZ 857301619

Lienholder(s) as of the print date. (Additional liens may exist. Check Lien Motor Vehicle Inquiry on https://servicearizona.com to find all current liens.)

FIRST LIEN-

CAPITAL ONE AUTO FINANCE

PO BOX 660068

LIEN DATE:

01222011

SACRAMENTO

CA 958650068

LIEN RELEASE

Lienholder Name Notary Public Signature Acknowledged before me this date. lien Amount Lienholder Signature Commission Expres

EXHIBIT 3

N.A.D.A. Official Used Car Guide **Vehicle Valuation**

Print Date: August 16, 2017

Customer: Burcham, Hilaria COAF-1019550 File No.:

Vehicle Description: 2011 CHEVROLET Malibu-4 Cyl. Sedan 4D LT

VIN: 1G1ZC5E14BF123337

Base Values

Retail: \$ 8050.00 Wholesale/Trade-in: \$ 5625.00

Optional Equipment/Adjustments

Estimated Miles 87500 \$ 0.00

Total Adjusted N.A.D.A. Used Car Guide Values

Retail: \$ 8050.00 Retail/Wholesale Average: \$ 6837.50

Reference 08/2017 Desert Southwest